

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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CERTIORARI TO BARNWELL COUNTY  
Court of Common Pleas

S.C. SUPREME COURT

The Honorable J. Mark Hayes, II, Circuit Court Judge

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Appellate Case No. 2018-000266  
Lower Court Case No. 2016-CP-06-0223

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MICHAEL C. KENNEDY,

RESPONDENT,

v.

STATE OF SOUTH CAROLINA,

PETITIONER.

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**PETITION FOR WRIT OF CERTIORARI**

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## PETITIONER'S ISSUES PRESENTED

- I. Whether the PCR court erred in granting post-conviction relief on grounds that Kennedy was denied effective assistance of counsel and the relief granted to him by the South Carolina Supreme Court where Kennedy *was* given the proper relief granted to him and Resentencing Counsel was not ineffective for failing to object to the resentencing hearing.
- II. Whether the PCR court erred in granting post-conviction relief on grounds that Resentencing Counsel was ineffective for failing to address a conflict of interest, failing to prepare for the resentencing hearing, and failing to make meaningful argument on his client's behalf where there was neither deficiency nor prejudice in any of Resentencing Counsel's actions.
  - A. Whether Resentencing Counsel was ineffective for failing to object to a "mere resentencing" hearing where Kennedy was given the exact remedy intended by this Court in his resentencing.
  - B. Whether Resentencing Counsel was ineffective for failing to address a "conflict of interest" at the resentencing hearing where there was no actual conflict of interest adversely affecting his representation.
  - C. Whether Resentencing Counsel was ineffective for failing to prepare for the resentencing hearing where his actions at the hearing were reasonable within professional norms under the facts and circumstances of this case and Kennedy failed to prove any specific deficiency or resulting prejudice.
  - D. Whether Resentencing Counsel was ineffective for failing to make a meaningful argument on his client's behalf where the record shows he vigorously argued for a lighter sentence on Kennedy's behalf.
- III. Whether Kennedy has waived the relief granted pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974) by failing to file a notice of cross-appeal required to obtain to the relief.

## STATEMENT OF THE CASE

Respondent Michael C. Kennedy (hereinafter “Kennedy”) is currently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Barnwell County Clerk of Court. Kennedy was indicted at the May 2007 term of the Barnwell County Grand Jury for armed robbery (2007-GS-06-0144) and assault and battery with intent to kill (2007-GS-06-0145). The charges arose from an occurrence on January 8, 2007, when Kennedy and codefendant Lugene Tooks attacked the 87-year-old victim at his home. App. 11. Tooks approached the victim on his back porch, got his attention, then hit him over the head with a wine bottle. App. 36. As Tooks “scuffled” with the victim, Kennedy came in and aided him in his attack. The two codefendants threw the victim off his porch and body-slammed him to the ground, causing severe, permanent injuries to his hip. They ripped off the victim’s back pocket and took his wallet containing more than \$500 before fleeing the scene. App. 37.

Franchot A. Brown, Esquire, represented Kennedy on the charges. On May 7, 2007, Kennedy pled guilty as indicted before the Honorable Thomas A. Russo. During sentencing, former circuit court judge, the Honorable Rodney Peoples, spoke on behalf of the victims. Judge Russo sentenced Kennedy to thirty years’ imprisonment for armed robbery and a consecutive twenty years’ imprisonment for assault and battery with intent to kill, suspended to three years’ probation upon the service of ninety days imprisonment. Kennedy filed a motion to reconsider his sentence on May 9, 2007. App. 86; 61. A hearing over the motion was held, and Judge Russo denied the motion in a verbal order on June 26, 2007. See App. 90.

A timely notice of appeal was filed and brief was filed pursuant to Anders v. California.<sup>1</sup> The brief raised the following issue: “Is appellant’s sentence of thirty years and a

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<sup>1</sup> 386 U.S. 738 (1967).

consecutive sentence of twenty years incarceration unconstitutionally disproportionate?” App. 98. M. Celia Robinson, Esquire perfected the appeal. The Court of Appeals dismissed Kennedy’s appeal by Order dated January 25, 2011. The Remittitur was returned on February 10, 2011.

**2011-CP-06-0088**

Kennedy filed his first application for Post-Conviction Relief February 22, 2011, in which he alleged he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel
  - a. Trial counsel failed to adequately prepare for Applicant’s guilty plea.
  - b. Trial counsel failed to present any witnesses to testify on Applicant’s behalf at the guilty plea.

Respondent made its Return to the application August 4, 2011. An evidentiary hearing into the matter was held on July 8, 2013, at the Aiken County Courthouse before the Honorable R. Ferrell Cothran, Jr. Kennedy was present and represented by Melissa J. Armstrong, Esquire. Kennedy testified on his own behalf at the hearing. Franchot A. Brown, Esquire also testified. By written order filed August 23, 2013, Judge Cothran denied and dismissed the application.

Kennedy filed a timely notice of appeal to the Supreme Court of South Carolina. Appellate Defender Wanda H. Carter, Esquire, perfected the appeal by filing a petition for writ of certiorari. The petition for writ of certiorari raised the following argument:

Trial counsel erred in failing to object to the personal opinions of a former circuit court judge who appeared at **all three** of petitioner’s court proceedings and acted in the role of a solicitor by opposing petitioner’s bond reduction and resentencing requests and asking for harsh sentencing as punishment for the criminal acts perpetrated upon a beloved local icon in order to gain community redemption and send a community message of zero tolerance for crime because such participation by the former judge was improper and the majority of the information submitted by the former judge was irrelevant to sentencing.

App. 124.

The State filed its return on November 26, 2014. On January 22, 2015, the Court issued an order granting the petition for writ of certiorari, dispensed with further briefing, reversed the order denying the PCR application and granted Kennedy a re-sentencing hearing. The order read, in full:

This matter is before the Court by way of a petition for a writ of certiorari from the denial of petitioner's application for post-conviction relief (PCR). The State has filed a return to the petition for a writ of certiorari. We grant the petition, dispense with further briefing, reverse the order denying the PCR application, and grant petitioner a new sentencing hearing.

App. 146. The Remittitur was issued February 10, 2015.

On May 14, 2015, the re-sentencing hearing was convened at the Barnwell County Courthouse before Judge Russo. Kennedy was represented again by Franchot A. Brown, Esquire. Judge Russo sentenced Kennedy to imprisonment for thirty years for armed robbery and twenty years imprisonment for assault and battery with intent to kill, with the sentences to run concurrently. Kennedy did not appeal the sentence.

#### **2016-CP-06-0223**

Kennedy filed his second and current application for post-conviction relief on May 16, 2016, alleging he was being held in custody unlawfully based on the following allegations:

1. Ineffective assistant of counsel
  - a. "Counsel violated his ethical obligation to advise petitioner, and the court, of any possible conflict. To whereas, an actual conflict of interest had an adverse effect on counsel performance during re-sentencing."
2. Judicial Bias
  - a. "The sentencing judge had personal and extrajudicial reasons that was partial and has thrust-upon a conflict, on the petitioner during his trial proceeding."

On June 8, 2017, Kennedy, through counsel Tricia A. Blanchette, filed an amendment to his application, amending his allegations to the following:

1. Applicant was denied the relief granted by the South Carolina Supreme Court, “a new sentencing hearing,” when prior plea counsel represented Applicant and the Honorable Thomas A. Russo resided over Applicant’s mere resentencing, which failed to cure the bias that tainted the prior sentencing hearing.
2. Ineffective assistance of resentencing hearing counsel (Franchot Brown, Esquire) for failing to address the conflict that resulted from Applicant successfully getting PCR relief from [sic] his prior representation, failing to prepare with Applicant prior to his resentencing hearing, and failing to make any meaningful argument on Applicant’s behalf.

The State filed its Return and Partial Motion to Dismiss on August 31, 2017.

An evidentiary hearing was held on September 22, 2017 before the Honorable J. Mark Hayes, II, at the Aiken County Courthouse. Kennedy was present and represented by Ms. Blanchette. Assistant Attorney General Julie A. Coleman of the South Carolina Attorney General’s Office appeared on behalf of the State. Kennedy testified on his own behalf and presented testimony from Franchot Brown, Esquire (hereinafter “Resentencing Counsel”). Judge Hayes issued an Order Granting Application for Post-Conviction Relief signed on October 25, 2017, and filed November 3, 2017. The State filed a Motion to Reconsider Pursuant to Rule 59(e) SCRPC on November 27, 2017. Kennedy made his response on January 3, 2018. Judge Hayes denied the motion in an Order signed January 22, 2018 and filed February 5, 2018. This Petition for Writ of Certiorari follows.

## STANDARD OF REVIEW

When reviewing questions of fact, this Court may affirm the post-conviction relief judge's grant of relief only if there is probative evidence to support his or her findings. Wolfe v. State, 326 S.C. 158, 163, 485 S.E.2d 367, 369 (1997) (citing McCray v. State, 317 S.C. 557, 455 S.E.2d 686 (1995); Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989)). However, the Court must overturn the post-conviction relief judge if there is no probative evidence to support his findings. Jackson v. State, 329 S.C. 345, 348, 495 S.E.2d 768, 769 (1998) (citing Satterwhite v. State, 325 S.C. 254, 481 S.E.2d 709 (1997); Holland v. State, 322 S.C. 111, 470 S.E.2d 378 (1996)). When reviewing questions of law, the Court conducts a *de novo* review, and must reverse the post-conviction relief judge when his decision is controlled by an error of law. Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014) (quoting Jordan v. State, 406 S.C. 443, 752 S.E.2d 538 (2013)).

## ARGUMENT

- I. **The PCR court erred in granting post-conviction relief on grounds that Kennedy was denied effective assistance of counsel and the relief granted to him by the South Carolina Supreme Court where Kennedy *was* given the proper relief granted to him and Resentencing Counsel was not ineffective for failing to object to the resentencing hearing.**

The PCR court erred in granting post-conviction relief when it misinterpreted an order of the South Carolina Supreme Court. On January 22, 2015, this Court issued an order granting Kennedy a new sentencing hearing after a former judge appeared on behalf of the victims at his original sentencing. App. 146. The case was remanded to the Circuit Court, and Kennedy appeared for his resentencing on May 14, 2015. The former judge was not present at the resentencing hearing and did not speak on behalf of the victims. Neither Kennedy, Resentencing Counsel, nor the Solicitor's Office raised any objections to the proceeding. Now, Kennedy asserts that the resentencing hearing was improper, and was not the relief granted by this Court, because it was held before the same judge with the same attorneys.

The PCR court agreed. In its Order granting PCR, the PCR court held that the South Carolina Supreme Court ordered Kennedy a "new sentencing hearing," rather than a "resentencing," and Kennedy was not given the relief ordered because resentencing counsel failed to "raise concerns that Applicant was being afforded a mere resentencing hearing instead of a 'new' sentencing hearing as ordered by the Supreme Court." App. 251. Essentially, the PCR court held that Resentencing Counsel, Kennedy, the Solicitor's Office, and Resentencing Judge Russo all misinterpreted the Supreme Court's order when they proceeded forward with a resentencing hearing with the same parties as at the original sentencing rather than requesting a hearing before a new judge with different defense counsel.

However, Kennedy's resentencing hearing was the exact remedy intended by this Court in its order, and Resentencing Counsel was not ineffective for failing to raise an objection based on the nature of relief he was provided. As evidenced by the example of Locklear v. Harvey, 273 S.C. 58, 254 S.E.2d 293 (1979), typically this Court will specifically state the remedy intended when granting relief. In Locklear, the Supreme Court granted a resentencing and explained that "[a]ny other circuit judge having jurisdiction in the trial circuits is authorized to impose the sentence." Locklear at 60, 254 S.E.2d at 293. Locklear was specifically given a resentencing hearing by another circuit judge because of improper behavior by the original sentencing judge which denied him effective assistance of counsel.

In the present case, there was no such improper behavior by the original sentencing judge, Judge Russo, and the Supreme Court did not specifically order a new hearing before a different circuit judge. The only issue on appeal was whether Counsel was ineffective for failing to object to the personal opinions of former circuit court judge, the Honorable Rodney Peeples, who spoke on the victim's behalf at the sentencing hearing. This Court granted a new sentencing hearing, and Kennedy was resentenced at a new hearing without any influence from Judge Peeples. The problem with the original sentencing hearing was the participation of Judge Peeples, and this problem was clearly cured by a resentencing hearing where Judge Peeples was not present.

Accordingly, because Kennedy was resentenced at a hearing with no input from Judge Peeples, he was given the full relief granted to him by this Court in its January 22, 2015 order. Resentencing Counsel was not deficient for failing to object to the resentencing hearing because it *was* the proper relief intended by the Supreme Court. Therefore, Kennedy was not denied

effective assistance of counsel at his resentencing, and the PCR court erred in granting post-conviction relief on this ground.

**II. The PCR court erred in granting post-conviction relief on grounds that Resentencing Counsel was ineffective for failing to address a conflict of interest, failing to prepare for the resentencing hearing, failing to make meaningful argument on his client's behalf, and failing to file an appeal where there was neither deficiency nor prejudice in any of Resentencing Counsel's actions.**

The PCR court granted post-conviction relief based on its ruling that Resentencing Counsel failed to address a conflict of interest, failed to prepare for the resentencing hearing, failed to make a meaningful argument on Kennedy's behalf, and failed to file an appeal. However, the record shows no deficiency or prejudice in any of Resentencing Counsel's actions, and this finding must be reversed.

Resentencing Counsel was not ineffective on any of Kennedy's claims. In a post-conviction relief action, the applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRPC; Butler v. State, 286 S.C. 441, 441, 334 S.E.2d 813, 814 (1985). Where ineffective assistance of counsel is alleged as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, at 442, 334 S.E.2d at 814.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, at 442, 334 S.E.2d at 814. The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, at 117, 385 S.E.2d at 625 (citing Strickland). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, at 117-18, 386 S.E.2d at 625.

**A. Resentencing Counsel was not ineffective for failing to object to a "mere resentencing" hearing because Kennedy was given the exact remedy intended by this Court in his resentencing.**

As argued above, the record shows Resentencing Counsel was not deficient in failing to object to the resentencing hearing being held before the same judge with the same defense attorney because the hearing was the exact relief granted by the Supreme Court in its January 22, 2015 order. Accordingly, there was no reason to object. This is further evidenced by the lack of objection from any other party involved at the hearing, including the Solicitor, Kennedy, and Judge Russo. The transcript of the resentencing hearing shows that all parties handled the hearing as they deemed appropriate under the Supreme Court's order. Resentencing Counsel's actions were clearly reasonable under professional norms in these circumstances, as required by Strickland, because all parties believed they had cured the defect in Applicant's original proceeding by excluding Judge Peeples and his remarks.

Furthermore, Kennedy has not proven he was prejudiced by Resentencing Counsel's failure to object to the proceeding because he has not shown that the outcome of the proceeding would have been any different if he had objected. Even if Applicant had been sentenced before a different judge with a different attorney to represent him, the circumstances surrounding the case

were the same. The record and testimony from the evidentiary hearing show Applicant admitted to the armed robbery and assault and battery with intent to kill of an 87-year-old victim on the front porch of his home where Applicant body-slammed the victim onto his concrete steps and his co-defendant hit him over the head with a glass wine bottle. Under the particularly bad facts of this case, any other circuit court judge would be just as likely to impose the maximum sentence allowed by law.

Because there is no deficiency or prejudice, neither prong of the Strickland test is met, and Resentencing Counsel was not ineffective on this ground.

**B. Resentencing Counsel was not ineffective for failing to address a “conflict of interest” at the resentencing hearing because there was no actual conflict of interest adversely affecting his representation.**

Kennedy asserts, and the PCR court ruled, that Resentencing Counsel had a conflict of interest in representing Kennedy at the resentencing hearing because he had previously been found ineffective in Kennedy’s first PCR action. The only mention of this conflict in the Order is a summary of counsel’s testimony from the evidentiary hearing—“When asked why he did not inform the court that it was a conflict for him to represent [Kennedy] on the hearing resulting from a finding of his own ineffectiveness, [Resentencing Counsel] simply responded that he was unaware of what transpired after he testified at the first evidentiary hearing.” App. 251. This testimony clearly shows that, even if there were an actual conflict of interest in this situation, it did not adversely affect Resentencing Counsel’s performance because he did not even know about it.

“In a PCR proceeding, the applicant bears the burden of demonstrating that he is entitled to relief.” Jordan v. State, 406 S.C. 443, 449, 752 S.E.2d 538, 541 (2013) (citing Miller v. State, 379 S.C. 108, 115, 665 S.E.2d 596, 599 (2008)). “The mere possibility defense counsel

may have a conflict of interest is insufficient to impugn a criminal conviction.” Lomax v. State, 379 S.C. 93, 101, 665 S.E.2d 164, 168 (2008) (quoting State v. Gregory, 364 S.C. 150, 152–53, 612 S.E.2d 449, 450 (2005)). “Indeed, ‘until a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance.’” Id. at 102, 665 S.E.2d at 168 (quoting Duncan v. State, 281 S.C. 435, 438, 315 S.E.2d 809, 811 (1984)).

A conflict of interest occurs when “a defense attorney places himself in a situation inherently conducive to divided loyalties.” Lomax, at 101, 665 S.E.2d at 168. To obtain relief, a defendant must show that an actual conflict of interest affected the adequacy of counsel’s representation. See Thomas v. State, 346 S.C. 140, 551 S.E.2d 254 (2001); Staggs v. State, 372 S.C. 549, 643 S.E.2d 690 (2007). “The mere possibility defense counsel may have a conflict of interest is insufficient to impugn a criminal conviction.” State v. Gregory, 364 S.C. 150, 152–53, 612 S.E.2d 449, 450 (2005). A defendant need not demonstrate prejudice if there is an actual conflict of interest.” Id., 364 S.C. at 153, 612 S.E.2d at 450.

Under South Carolina law, to obtain relief, Kennedy must prove two things: (1) that Resentencing Counsel had an actual conflict of interest; and (2) that the conflict of interest adversely affected his representation. Here, Kennedy contends Resentencing Counsel had an actual conflict of interest at the resentencing because he had just been found ineffective in his earlier representation of Kennedy. However, this is not necessarily a conflict of interest, and being found ineffective for failing to object to improper comments on behalf of the victims would not create a conflict in a situation where the improper comments are not made in a subsequent proceeding. Resentencing Counsel did not owe a duty to any other party that would harm his client’s interest. Kennedy has not proven that counsel had divided loyalties between his

interests and Kennedy's. Furthermore, even if this were an actual conflict of interest, Kennedy clearly knew about the conflict because he filed the first PCR action against his attorney. By choosing to go forward at the resentencing hearing with the same attorney, he and Resentencing Counsel both effectively waived that potential conflict.

More importantly, even if counsel's representation did present an actual conflict of interest, Kennedy cannot prove that the conflict adversely affected Resentencing Counsel's representation. Resentencing Counsel's testimony from the evidentiary hearing shows he was not even aware at the time that he had been found ineffective in the first PCR action. App. 212. He testified that he did not know that the first PCR action was granted. App. 212. Accordingly, the conflict could not have adversely affected his representation because he did not even know about it. Nothing in the record shows Resentencing Counsel acted any differently than he normally would have in any other representation.

Therefore, because Kennedy has not proven an actual conflict of interest or that the conflict adversely affected counsel's representation, the PCR court's ruling on this ground should be overturned.

**C. Resentencing Counsel was not ineffective for failing to prepare for the resentencing hearing because his actions at the hearing were reasonable within professional norms under the facts and circumstances of this case and Kennedy failed to prove any specific deficiency or resulting prejudice.**

The PCR court held Resentencing Counsel was ineffective for failing to prepare for the resentencing hearing. The Order granting PCR noted counsel's testimony that he did not recall being given much advance notice of the hearing or meeting with Kennedy prior to the date of May 14, 2015. App. 251. However, Kennedy failed to prove prejudice by showing what counsel could have done differently that would have changed the outcome of the proceeding.

Resentencing Counsel was clearly familiar with the case. He knew the facts, as well as his client's version of the story. Nothing essential had changed from the original sentencing hearing to the resentencing. There was nothing more counsel could have presented to mitigate the sentence. Resentencing Counsel presented extensive mitigation to the sentencing judge at the first hearing, as well as at the hearing over his motion to reconsider the sentence, at which he compared Kennedy's sentence to other inmates who had committed similar or worse crimes and received lesser sentences. Resentencing Counsel knew Judge Russo was familiar with the case and had heard his mitigation argument at least twice. Still, he reminded Judge Russo of his arguments and made a further plea to lighten to the sentence based on the current posture of the case.

Kennedy failed to present at the evidentiary hearing any further witnesses, documents, or arguments that Resentencing Counsel should have presented at the resentencing to get a lesser sentence. Therefore, it is merely speculative that counsel's alleged deficient performance was prejudicial to Kennedy. See Glover v. State, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995) (noting mere speculation and conjecture on the part of applicant is insufficient to substantiate allegation that counsel's deficient performance was prejudicial). "Strickland does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing. Nor does Strickland require defense counsel to present mitigating evidence at sentencing in every case. Both conclusions would interfere with the 'constitutionally protected independence of counsel' at the heart of Strickland." Wiggins v. Smith, 539 U.S. 510, 533, 123 S. Ct. 2527, 2541, 156 L. Ed. 2d 471 (2003).

Finally, Kennedy was not prejudiced by any alleged failure on Resentencing Counsel's part because he received a lesser sentence at the resentencing than his original sentence. Judge

Russo initially sentenced Kennedy to 30 years for armed robbery and 20 years for ABWIK, to run consecutively, provided upon the service of 90 days the balance was suspended to a three year probationary sentence. At the resentencing, Judge Russo reduced his sentence to 30 years and 20 years on each charge, but he ran the sentences concurrently, with no additional probationary sentence. Because Kennedy was given a lesser sentence, and because he failed to specifically show what counsel should have done differently, he has failed to prove prejudice. Accordingly, Kennedy failed to prove either deficiency or prejudice, this finding of ineffectiveness should be overturned.

**D. Resentencing Counsel was not ineffective for failing to make a meaning argument on his client's behalf where the record shows he vigorously argued for a lighter sentence on Kennedy's behalf.**

The PCR court improperly held Resentencing Counsel was ineffective for failing to make a meaningful argument on Kennedy's behalf at the resentencing. This finding is simply untrue and unsupported by the record.

First, Resentencing Counsel presented a lengthy plea for two ten-year concurrent sentences at the original plea hearing. App. 39-42. He explained to the court that Kennedy was apologetic for remorseful for his actions. He apologized to the victims and noted Kennedy was only a teenager when this act occurred. After he was sentenced, Resentencing Counsel filed a motion to reconsider the sentence, which was argued before Judge Russo. At this hearing, he again presented his mitigation and compared Kennedy's case to other cases where the defendant had much lighter sentences for similar or worse crimes.

At the resentencing hearing, it was understood that Judge Russo had reviewed the transcript from the original sentencing hearing and had reminded himself of Kennedy's mitigation and argument in his favor. Resentencing Counsel had already argued his case to Judge

Russo twice before the resentencing, and it was clear Judge Russo knew his argument. He again apologized to the victims and explained that Kennedy was only 18 years old when the crime occurred. App. 154-155. He explained that his client had already spent eight and a half years in prison for this offense. App. 154. In addition to his previous argument, which he briefly reminded the judge of at the resentencing, he begged the court to reduce the sentence based on the fact that the Supreme Court remanded it for a new hearing, so they must have believed a lighter sentence was more appropriate. He further argued that the victim no longer required restitution for his medical expenses, so the probationary sentence was no longer necessary. App. 155-156. Counsel then corrected the State's version of the facts and explained to the court that Kennedy did not "body slam" the victim. App. 160.

Resentencing Counsel obviously presented meaningful argument on Kennedy's behalf, and his actions were not deficient. Nothing in the record before this Court shows what counsel could have done differently to get an even lesser sentence than he did. The resentencing court agreed with counsel's argument and did not order a probationary sentence because restitution was no longer necessary. App. 163. Again, Kennedy was not prejudiced by any alleged failure to argue on his behalf because Kennedy was actually given a lighter sentence at the resentencing than his original sentence.

Accordingly, Kennedy has failed to prove deficiency or prejudice, and neither prong of the Strickland test is met. Therefore, the grant of post-conviction relief on this finding should be overturned.

**III. Kennedy has waived the PCR court's grant of a belated review of direct appeal issues pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974) by failing to file a notice of cross-appeal required to obtain to the relief.**

At the evidentiary hearing, Resentencing Counsel testified that he did not recall advising Kennedy of his right to appeal his sentence following the resentencing hearing. App. 214-215. The PCR court held Resentencing Counsel did not consult with Kennedy about his appellate rights and Kennedy was therefore entitled to a belated appeal of direct appeal issues pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974). App. 254-255.<sup>2</sup> Petitioner submits Kennedy was not entitled to relief under White because there was no constitutional requirement that Resentencing Counsel advise him of his right to appeal his new sentence.

Following a trial, counsel is required to make certain the defendant is made fully aware of the right to appeal. Turner v. State, 380 S.C. 223, 224-25, 670 S.E.2d 373, 374 (2008) (internal citations omitted). "In the absence of an intelligent waiver by the defendant, counsel must either initiate an appeal or comply with the procedure in Anders v. California, 386 U.S. 738 (1967)." Id. "However, the standard for a guilty plea differs. Absent extraordinary circumstances, such as when there is reason to think a rational defendant would want to appeal (for example, because there are non-frivolous grounds for appeal) or when the defendant reasonably demonstrated an interest in appealing, there is no constitutional requirement that a defendant be informed of the right to a direct appeal from a guilty plea." Id. (citing Roe v. Flores-Ortega, 528 U.S. 470 (2000); Weathers v. State, 319 S.C. 59, 459 S.E.2d 838 (1995)).

Here, there were no objections made at the proceeding and no non-frivolous grounds for a direct appeal from the resentencing hearing. Kennedy failed to prove that he reasonably

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<sup>2</sup> The PCR court's order included a footnote explaining that the State did not oppose the granting of a belated appeal. App. 254, fn. 7. However, this footnote is inaccurate, as the record shows the State never consented to White relief.

demonstrated an interest in appealing his new sentence. Accordingly, there was no constitutional requirement to inform Kennedy of his right to an appeal, so Resentencing Counsel cannot be ineffective on this ground.

Furthermore, Kennedy had filed a direct appeal from his previous guilty plea and sentencing hearing and was clearly aware of his right to do so based on his prior experience in this case. However, there is no evidence that Kennedy asked Resentencing Counsel about an appeal or instructed him to file one. This would indicate that Kennedy did not wish to appeal his new sentence.

Regardless, the PCR court granted Kennedy a belated review of direct appeal issues pursuant to White. However, Kennedy did not file a notice of cross-appeal, which was procedurally necessary to obtain this relief, as noted in the Order granting the relief. Accordingly, Kennedy has affirmatively chosen not to proceed on his grant of White relief, and this Court should find he is no longer entitled to a belated review of direct appeal issues.

## CONCLUSION

For the foregoing reasons, the State respectfully requests this Court to grant certiorari, dispense with further briefing, and correct this error by reversing the PCR court's ruling granting post-conviction relief. In the alternative, the State requests this Court to grant certiorari and allow the opportunity to fully brief the issue.

Respectfully submitted,

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October 17, 2018

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

\_\_\_\_\_  
CERTIORARI TO BARNWELL COUNTY  
Court of Common Pleas

The Honorable J. Mark Hayes, II, Circuit Court Judge

\_\_\_\_\_  
Appellate Case No. 2018-000266

**RECEIVED**

OCT 17 2018

S.C. SUPREME COURT

MICHAEL C. KENNEDY,

RESPONDENT,

v.

STATE OF SOUTH CAROLINA,

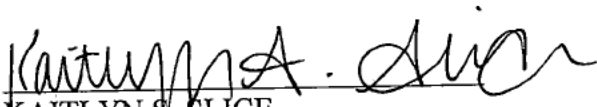
PETITIONER.

\_\_\_\_\_  
**CERTIFICATE OF SERVICE**  
\_\_\_\_\_

The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari, has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

**Tricia A. Blanchette, Esquire**  
**Law Office of Tricia A. Blanchette, LLC.**  
**Post Office Box 2147**  
**Leesville, South Carolina 29070**

This 17th day of October, 2018

  
KAITLYN S. SLICE  
LEGAL ASSISTANT



ALAN WILSON  
ATTORNEY GENERAL

October 17, 2018

RECEIVED  
OCT 17 2018  
S.C. SUPREME COURT

The Honorable Daniel E. Shearouse  
Clerk, Supreme Court of South Carolina  
Post Office Box 11330  
Columbia, South Carolina 29211

**Re: Michael C. Kennedy v. State of South Carolina**  
**Appellate Case No. 2018-000266**  
**Lower Court Case No. 2016-CP-06-0223**

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the Petition for Writ of Certiorari and Appendix. By copy of this letter we are serving opposing counsel today.

Sincerely,

Julie A. Coleman  
Assistant Attorney General  
SC Bar No. 102214

JAC/ks  
Enclosures

cc: Tricia A. Blanchette, Esquire (2 copies)